LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-800

JUDITH EVA HERSKOWITZ,

Petitioner,

vs.

BERNARD J. HERSKOWITZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

ROBERT M. BRAKE
and
DAVID BOLTON
Attorneys of Appellant
1830 Ponce de Leon Boulevard
Coral Gables, Florida 33134

INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2–3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3–4
STATEMENT OF THE FACTS	4–6
REASONS FOR GRANTING THE WRIT	6–7
CONCLUSION	7–8

APPENDIX

OPINION, DISTRICT COURT OF APPEAL, THIRD DISTRICT	App. 1

CITATIONS

PAGE

CONSTITUTION

Section 1, Amendment 14, U. S. Constitution 3,4,7
Article Four, Section 1, U. S. Constitution 3,4,7
Article Ten, Section Five, Florida Constitution, 1968 .. 6

STATUTES

28 USC 1257(3) 2
Florida Statutues, Section 708.09, 708.10 6

RULES

Rule 19, Supreme Court Rules 2

NEW YORK LAW

Section 3-301, McKinney's New York General Obligations Law 4,6

CASES

Clark v. Clark, 76 So. 2d 426..... 7
Cooke v. Cooke, 1944, 150 P. 2d 514, 65 Cal. App. 2d 260 6
Wallihan v. Hughes, 1954, 82 SE 2d 553, 196 Va. 117 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

JUDITH EVA HERSKOWITZ,

Petitioner,

vs.

BERNARD J. HERSKOWITZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the District Court of Appeal of Florida, Third District, entered on the 21st day of August, 1973, in the above case.

OPINION BELOW

The opinion of the District Court of Appeal, Third District of Florida, is reported in 281 So.2d 595. Copy of said opinion is attached hereto in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19 of the Supreme Court Rules in that in the courts below Petitioner specially set up or claimed title to the property and rights, privileges and immunities under the Constitution of the United States and the state courts below decided a federal question of substance not theretofore determined by this Court or decided it in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

In 1956, while the parties were residents of the State of New York, Petitioner and Respondent, who were husband and wife, entered into a contract by which the wife conveyed her interest in the business to the husband and herself as joint owners, and the parties agreed that all their assets would be jointly owned from that day on. In 1967 the wife began litigation in the Supreme Court, County of Bronx, New York, seeking an accounting and other relief. During the pendancy of that litigation the husband brought this suit for divorce in 1970. The Florida court ignored the efforts of the New York court to obtain an accounting from the husband and ignored evidence indicating that the husband owned cash, stocks and mortgages in the neighborhood of $300,000, as well as extensive real estate holdings, and entered a Final Judgment of Divorce awarding the wife "special equities" amounting to $26,500, which was increased on Petition For Rehearing to $46,500. The court also

directed the wife to dismiss all litigation in New York concerning the enforcement of the agreement between the husband and wife.

The questions presented to this Court are:

1. Did the Florida court deprive the wife of her property without due process of law in violation of Section I, Amendment 14, United States Constitution, when it:

(a) Ignored the contract of joint ownership and awarded the wife only $46,500 out of more than $300,000 in assets? Or,

(b) Ordered the wife to dismiss her New York suit to enforce the contract?

2. Did the Florida court fail to give full faith and credit to New York laws in violation of Article 4, Section I, United States Constitution, when it failed to enforce a contract made in New York and valid under the laws of that state?

3. Did the Florida courts fail to give Petitioner the equal protection of its laws by failing to enforce the post nuptial agreement for her, when such post nuptial agreements have been enforced in favor of husbands?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitutional provisions and Statutes involved are as follows:

Section I, Amendment 14, United States Constitution:

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

Section I, Article 4, United States Constitution:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

Section 3-301, McKinney's New York General Obligations Law:

"A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business."

STATEMENT OF THE FACTS

The parties were married in New York on January 10, 1956. At that time the husband had about $2,000 or $3,000 in savings and worked for his father at a salary of $75 or $80 per week. The wife was a one-third owner of a family business having a value in excess of $100,000. She worked for the business and was drawing a salary of $125 per week. After the marriage, both parties continued to work for the business and drew a joint salary in the amount of $250 per week plus certain expenses.

On August 15, 1956, the parties entered into an agreement in which the wife agreed to give all of her interest in the family business to the joint ownership of both parties, and both parties agreed that they would grant the other party one-half ownership of all "assets, income, profits, wages, earnings, investments and properties" except inheritances, which each then presently owned or might acquire thereafter until the agreement was

"dissolved by the written signed agreement of both parties. Upon such a dissolution by agreement, all assets that the said parties shall have, shall be equally divided between them."

The wife performed the agreement by conveying to the husband the promised interest in the family business.

The parties resided together in New York until early in 1966, at which time they separated. Prior to the separation, the husband had taken control of the business and, both before and after the separation, accumulated assets which at the time of the divorce hearing totalled several hundred thousand dollars. At no time did the parties terminate the agreement by a subsequent agreement in writing.

As stated by the court below, "the record indicates that the appellee made a conscious effort to conceal his assets from his wife." In 1966, the wife brought suit in the Family Court of the State of New York for support for herself and the two minor children of the parties. In 1967, she began litigation in the Supreme Court, County of Bronx, New York, seeking to enforce the contract and to obtain an accounting from the husband. While this litigation was pending the husband, in 1969, moved to Florida and on May 5, 1970 filed a Complaint For Divorce in the case at bar in Dade County, Florida. The wife answered and filed a counterclaim. After extensive testimony and hearings a Final Judgment was entered on May 19, 1971, granting a divorce and awarding the wife the sum of $26,500 as "a special equity in the assets of" the husband, to be paid over a five-year period. The wife filed a Petition For Rehearing which was granted on the sole issue of the wife's "special equitable and legal interests in the assets of" the husband. Prior to the final rehearing, extensive discovery was attempted which indicated that the husband's assets probably amounted to around $300,000.

Thereafter, the court entered its Final Judgment Upon Rehearing, which increased the wife's "equity in the assets and accumulated earnings" of the husband to $46,500, payable in four installments. The court also ordered the wife "to dismiss all legal action pending against (the husband) pertaining to his assets."

The wife took an appeal to The Court of Appeals, Third District of Florida, which affirmed the trial court.

REASONS FOR GRANTING THE WRIT

The parties entered into an agreement whereby each was to become owner of one-half of the assets of the other. This agreement was lawful in New York at the time it was made (McKinney's New York General Obligations Law, Section 3-301), and was lawful in Florida at the time of the divorce proceedings. (See Florida Constitution, 1968, Article Ten, Section Five; Florida Statutes, Section 708.09,708.10). The evidence showed that the husband had sold the business originally conveyed to him by the wife for $112,000; owned one-half of a mortgage in the amount of $175,000; owned twenty-five percent of 116 acres in Hope, New Jersey; was one-third owner of a farm, and owned one-half interest in two closely held corporations worth in excess of $100,000. In addition, he had other assets not specifically valued in this case. The total of these assets is in the neighborhood of $300,000, and one-half of this amount would be approximately $150,000. The court below originally gave the wife only $26,500 and later increased it to $46,500.

By failing to give the wife one-half of the total amount owned by the husband, either in kind or in cash, the court has deprived the wife of her property and has given it to the husband. The court failed to state any rule of law authorizing such a taking of property.

This constitutes state action depriving a person of property without due process of law. Although there is no case from this Court on point, a similar case arose in **Cooke v. Cooke**, 1944, 150 P. 2d 514, 65 Cal. App. 2d. 260, where the husband had made a gift of a life insurance policy to his wife and, after divorce, attempted to obtain a restoration of the policy. The California court held that this would have the effect of depriving the wife of her property without due process of law.

Furthermore, by failing to enforce the contract, the court has ignored the laws of the State of New York which authorized the making of such a contract between a husband and a wife.

While there is no case of this Court on point, it has been held that a post nuptial agreement which was valid when entered into and approved by a court of competent jurisdiction is required to be given full faith and credit in a sister state (**Wallihan v. Hughes**, 1954, 82 SE 2d. 553, 196 Va. 117). In that case the contract was contrary to Virginia public policy, but Virginia was required to enforce it nevertheless. **A fortiori**, the contract should have been enforced in the case at bar since it was not contrary to Florida public policy.

Finally, Florida's courts have consistently upheld post nuptial agreements, particularly where they favor the claims of the husband against the wife. See **Clark v. Clark**, 76 So. 2d 426. By failing to enforce this agreement, the courts below failed to give Petitioner the equal protection of the laws, in violation of Section I, Amendment 14 to the United States Constitution.

The courts below were therefore in error in failing to give the wife a one-half interest in and to all of the property of the husband, and further erred in restraining her from seeking full and complete accounting from the husband and full and complete performance of the contract through the courts in New York.

CONCLUSION

The courts below have deprived Petitioner of the bulk of her interest in the husband's property by failing to enforce the New York contract by which she was given this property. She has, therefore, been deprived of her property without due process of law, contrary to Amendment 14, Section I, United States Constitution. Furthermore, the act of the court in failing to enforce the New York contract, which was lawful when and where made, constitutes a failure to give full faith and credit to the laws of New York State making this contract lawful when and where executed, contrary to Article Four, Section I, United States Constitution. Finally, by failing to enforce this agreement in favor of the wife, while enforcing similar agreements in favor of the husband, the Florida courts failed to give Petitioner

the equal protection of the laws, in violation of Section I, Amendment 14 to the United States Constitution. This Court should, therefore, issue a Writ of Certiorari to the courts below and issue its Mandate, directing that so much of the Final Judgment of Divorce as purports to divide the property of the parties and to restrain the wife from enforcing the property agreement be set aside, subject to further proceedings in the appropriate forum.

RESPECTFULLY SUBMITTED

ROBERT M. BRAKE
and
DAVID BOLTON
Attorneys for Appellant
1830 Ponce de Leon Boulevard
Coral Gables, Florida 33134

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT JULY TERM, A.D. 1973
CASE No. 72–1396

Opinion filed August 21, 1973.

(BALANCE OF CAPTION OMITTED)

PER CURIAM.

The appellant is the former wife of the appellee. She appeals a final judgment of divorce by presenting and arguing some twenty-one points on appeal. We affirm upon a holding that all of the matters presented fall within two categories; they are either procedural errors which were induced by the appellant's own actions or they relate to findings which are supported by evidence before the trial judge and are within the range of his judicial discretion. For obvious reasons we will not attempt to discuss each point separately. However, we will briefly state the origin of the problems involved and the basic principles supporting the trial judge's disposition of the issues presented.

The parties were married in New York in 1956. A few months after the marriage, the husband and wife entered into a contract by which the wife conveyed her interest in a business to her husband and herself as joint owners, and the parties agreed that all their assets would be jointly owned from that day on. The husband and the business prospered but the marriage did not. After the business in which the parties owned a joint interest was sold in 1965, and after the appellee husband began to variously invest the monies he received, the Family Court of the State of New York entered an order in 1966 providing for the support of the appellant and her two minor children. The record indicates that the appellee made a conscious effort to conceal his assets from his wife. In 1967, the appellant wife began litigation in the Supreme Court, County of Bronx, New York, seeking an accounting and other relief against the appellee, his father and two brothers. She sought enforcement of her rights of joint ownership as set out in the contract of 1956.

The appellee husband brought the instant action for divorce in 1970. The appellant answered, filed a counterclaim, and attached the 1956 agreement. After extensive testimony and hearings a final judgment was entered on May 19, 1971. This judgment awarded the appellant the amount of $26,500.00 as "a special equity in the assets of the Plaintiff". The court ordered the amount paid "in equal annual payments over a five (5) year period commencing (30) days from [the] date of this Order". The appellant filed her motion for new trial and petition for rehearing. In the petition, she urged that the court had not properly considered the income and assets of the plaintiff and the written agreement pertaining thereto for joint ownership of assets. The trial judge granted appellant's motion for new trial on September 7, 1971, on the sole issue "of the Defendant, Judith Herskowitz' special equitable and legal interest in the assets of the Plaintiff, Bernard J. Herskowitz". Prior to the final rehearing, the court entered orders permitting the appellant to take extensive depositions. Thereafter, the court entered its final judgment on rehearing. This judgment reaffirmed the prior judgment except as to provisions regarding appellant's interest in her husband's assets. As to these assets, the court found:

* * * * * * * * * * *

"(1) The Court finds from all of the testimony and voluminous exhibits in evidence that the Defendant, based on special equities, and the aforesaid postnuptial agreement, has an equity in the assets and the accumulated earnings, wages and profits of the Plaintiff in the amount of $46,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant as follows:

(a) Ten thousand dollars within thirty (30) days from the date hereof, and

(b) The balance in three (3) equal installments beginning thirteen (13) months from and after the date hereof."

* * * * * * * * * * *

In addition, the court made the following order relative to other litigation pending between the parties:

* * * * * * * * * * * *

"(2) The Defendant, JUDITH HERSKOWITZ, be and she is hereby required to dismiss all litigation pending against the Plaintiff pertaining to his assets and all causes of action arising therefrom, including assessment of damages for alleged concealment thereof now pending against him."

* * * * * * * * * * * *

[1,2] On this appeal, one of appellant's principal contentions is that the court had no jurisdiction to determine the rights of the parties to the contract made between the parties in 1956. We think that this position is untenable in view of the fact that the appellant herself introduced the contract into the litigation and petitioned for and received an extensive rehearing based upon the application of that contract to the assets of the appellee. The court did not err in pursuing the matter at the appellant's request inasmuch as it is well established that upon a termination of marriage by a divorce of dissolution, the trial judge should insofar as possible settle all outstanding property rights between the parties. See Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (1948); Dotter v. Dotter, Fla. App. 1962, 147 So. 2d 209.

[3,4] Appellant's contention that the court erred in enjoining her from further prosecution of additional court proceedings to enforce the same rights which she has litigated in this cause is without legal basis. In order to insure the efficacy of judgments in dissolution of marriage cases, the courts have frequently wielded their power of injunction. See cases collected at 10A Fla. Jur. Dissolution of Marriage, Separation, and Annulment, 167, et seq. The power may be used to prevent harassment after final judgment. See Bazzano v. Bazzano, Fla. App. 1965, 175 So. 2nd 801. Therefore, the order is proper under the circumstances of this case.

[5] The Appellant has also urged reversal of the finding concerning the extent of appellant's interest in the appellee's property. An examination of the lengthy record convinces us that the finding is based upon conflicting evidence and that we

may not substitute our view for that of the trial judge. See Hobbs v. Hobbs, Fla. App. 1962, 136 So. 2d 363.

Appellant has pointed out that the trial court's order directing the payment of the sum of $46,500.00 in three equal installments fails to specify at what intervals of time these installments must be paid. In view of the fact that the trial court reaffirmed the provisions of its prior judgment except as changed in the final judgment upon rehearing, we conclude that the provision objected to should be amended by providing that the sum of $46,500.00 is to be paid as follows: (a) $10,000.00 immediately upon remand of this cause; and, (b) the balance in three equal installments, the first installment to be paid on or before the 12th day of July, 1974, a like installment to be paid on or before the 12th day of July, 1975, and a like installment to be paid on or before the 12th day of July, 1976.

We have considered the other points raised on appeal and find that they do not present reversible error.

The judgment appealed is amended as to the installment payments as above set out and as amended is affirmed.

Affirmed.